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7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10  
11 SANDRA McMILLION, JESSICA ADEKOYA,  
AND IGNACIO PEREZ, on Behalf of  
12 Themselves and all Others Similarly Situated,

13 Plaintiffs,

14 v.

15 RASH CURTIS & ASSOCIATES,

16 Defendant.

Case No.: 4:16-cv-03396-YGR JSC

**DEFENDANT RASH CURTIS &  
ASSOCIATES' MOTION FOR  
RECONSIDERATION OF MOTION FOR  
SUMMARY JUDGMENT IN LIGHT OF *ACA*  
*INTERNATIONAL V. FEDERAL*  
*COMMUNICATIONS COMMISSION***

Date: May 8, 2018  
Time: 2:00 P.M.  
Dept: Courtroom 1

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**NOTICE OF MOTION**

TO THE PLAINTIFFS AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on May 8, 2018 at 2:00 p.m., or as soon thereafter as counsel may be heard, in Department 1, 4<sup>th</sup> Floor, of the above-entitled Court, located at 1301 Clay Street, Oakland, California, Defendant Rash Curtis & Associates will, and hereby does, move the Court to reconsider its January 30, 2018 order regarding the parties' cross-motions for summary judgment in light of the recent outcome of *ACA International v. Federal Communications Commission*, 2018 WL 1352922 (D.C. Cir. March 16, 2018).

This motion is based upon this Notice of Motion and Memorandum of Points and Authorities, the Declarations of Bob Keith and Mark E. Ellis (and the exhibits attached thereto), all pleadings and papers on file in this action (including the parties' previous cross-motions for summary judgment and all supporting documentation), and upon such other matters or evidence as may be presented to the Court at the time of the hearing.

**REQUEST FOR RELIEF**

Rash Curtis hereby requests that this Court issue an order:

1. Denying Plaintiffs' Motion for Partial Summary Judgment on the issue of whether Rash Curtis' three dialers (Global Connect, TCN, and DAKCS/VIC) constitute ATDSs;
2. Granting Partial Summary Judgment to Rash Curtis on the issue of whether Rash Curtis' three dialers do not constitute ATDSs because, although they are "predictive dialers," they do not have the capacity to store or produce telephone numbers using a random or sequential number generator, and to dial such numbers (without human intervention);
3. Granting Partial Summary Judgment to Rash Curtis on the issue of TCPA liability based on the fact that none of the calls which were placed without prior express consent were done so using an ATDS or a pre-recorded or artificial voice; and
4. Granting Rash Curtis' Motion for Partial Summary Judgment as to Mr. Perez's TCPA claim on the basis that, in the absence of actual knowledge that the cell phone number ending in 5193 had been reassigned to Mr. Perez, Rash Curtis was acting in "reasonable reliance" on the prior express consent provided by the cell phone number's previous owner, Mr. Reynoso.

## I. AUTHORITY

A district court may reconsider its grant or denial of summary judgment under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment). *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9<sup>th</sup> Cir. 1993); *American Civil Liberties Union of Kentucky v. McCreary County, Ky.*, 607 F.3d 439, 450 (6<sup>th</sup> Cir. 2010) and O’Connell, *Cal. Prac. Guide: Civ. Proc. Before Trial* § 14:361.1 (Rutter Group 2018).

Reconsideration is appropriate when, as here, there is an intervening change in controlling law. *Watanabe v. Home Depot USA, Inc.*, 2003 WL 24272634, at \*1 (C.D. Cal. August 26, 2003) (*citing School Dist. No. 1J, supra*, 5 F.3d at 1263); *American Civil Liberties Union, supra*, 607 F.3d at 450; *All Hawaii Tours, Corp. v. Polynesian Cultural Center*, 116 F.R.D. 645, 648 (D. Haw. 1987); O’Connell, *supra*, at § 14:362; Civil L. R. 7-9(b).

Here, the intervening change in controlling law occurred on March 16, 2018, when the United States Court of Appeals, District of Columbia Circuit, issued its highly-anticipated decision in *ACA International v. Federal Communications Commission*, \_\_\_\_ F.3d \_\_\_\_, 2018 WL 1352922 (D.C. Cir. March 16, 2018).

The Court of Appeals “set aside the Commission’s explanation of which devices qualify as an ATDS, as well as its understanding of when a caller violates the Act by calling a wireless number held by a consenting party but reassigned to a person who has not given consent.” *Id.* at \* 4.

Rash Curtis submits any possible TCPA liability here was eliminated by the holdings in *ACA International*. Reconsideration of the Court’s February 2, 2018, order regarding the parties’ cross-motions for summary judgment is thus warranted (Dkt. No. 167) (“MSJ Order”).

## II. THE COURT’S SUMMARY JUDGMENT ORDER

The parties filed their cross-motions for summary judgment on December 11, 2017. (*See* Dkt. Nos. 139-140.) Oppositions to the cross-motions were filed on January 8, 2018 (*see* Dkt. Nos. 151-152), and replies were filed on January 15, 2018. (*See* Dkt. Nos. 157-158.) The cross-motions came on for regular hearing on January 30, 2018. (*See* Civil Minutes, Dkt. No. 164.) On February 2, 2018, this Court issued its Order Re: Cross Motions For Summary Judgment. (*See* Dkt. No. 167.)



1 **A. Plaintiffs’ Argued, And The Court Found, Rash Curtis’ Dialers Constituted ATDSs**  
 2 **Because They Are Predictive Dialers.**

3 Plaintiffs sought partial summary judgment on the issue of whether Rash Curtis’ Global  
 4 Connect, TCN, and DAKCS/VIC dialers constituted “automatic telephone dialing systems”, or  
 5 “ATDSs” within the meaning of the Telephone Consumer Protection Act of 1991, 47 U.S.C. §  
 6 227(a)(1). (*See* MSJ Order, Dkt. No. 167, p. 2:2-5.)

7 Notably, Plaintiffs did not argue that the dialers were ATDSs because they were able to “store  
 8 or produce telephone numbers to be called, using a random or sequential number generator, and to dial  
 9 such numbers.” 47 U.S.C. § 227(a)(1) (emphasis added). Instead, Plaintiffs proffered the argument  
 10 that the dialers were ATDSs simply because they possessed “predictive dialing” capabilities which  
 11 allowed them to operate without human intervention. (*See, e.g.*, Plaintiffs’ Motion for Partial  
 12 Summary Judgment, Dkt. No. 139, pp. 6:7-11:2; Plaintiffs’ Supporting Separate Statement, Dkt. No.  
 13 139-1, Issue Nos. 1-3.)

14 Conceding that its dialers had “predictive dialing” capabilities, Rash Curtis nevertheless argued  
 15 that its dialers were not ATDSs because they could not operate without human intervention and, more  
 16 importantly, they did not possess “the capacity store or produce telephone numbers using a random or  
 17 sequential number generator,” - a clear and unambiguous requirement imposed by the plain language  
 18 of the TCPA. 47 U.S.C. § 227(a)(1); *see, e.g.*, Rash Curtis’ Opposition to Plaintiff’s Motion for Partial  
 19 Summary Judgment, Dkt. No. 152, pp. 1:3-18, 16:25-20:7, 23:23-25; Rash Curtis’ Response to  
 20 Plaintiffs’ Supporting Separate Statement, Dkt. No. 152-7, Issue Nos. 1-3; p, Dkt. No. 152-3, ¶¶ 32-33;  
 21 Declaration of Chris Paff, Dkt. No. 152-4, ¶ 2; Declaration of Dan Correa, Dkt. No. 152-5, ¶ 2;  
 22 Declaration of Nick Keith, Dkt. No. 152-6, ¶ 2.)

23 Relying heavily upon the FCC’s various declaratory rulings and orders, this Court granted  
 24 Plaintiffs’ motion on this point, finding that Rash Curtis’ dialers were ATDSs within the meaning of  
 25 the TCPA, solely because of their “predictive dialing” capabilities. (MSJ Order, Dkt. No. 167, p. 2:16-  
 26 17.) The Court explained its reasoning:

27 **The TCPA defines ATDSs as “equipment which has the capacity –**  
 28 **(A) to store or produce telephone numbers to be called, using a**  
**random or sequential number generator; and (B) to dial such**

numbers.” 47 U.S.C. § 227(a)(1). **Predictive Dialers**, “unlike prior versions of automated dialing technology [that] created and dialed 10-digit phone numbers arbitrarily . . . employ a stored database of numbers which could then be dialed at a rate to ensure that when a consumer answered the phone, a sales person would be available to take the call.” *Hernandez v. Collection Bureau of Am., Ltd.*, 2014 WL 4922379, at \*2 (C.D. Cal. 2014) (quoting 43 F.C.C. 2003, 1953 WL 83579, at 14092 (“2003 Federal Communication Commission (‘FCC’) Order”)). The FCC and several district courts have “recognized that[,] technological advances aside, ‘the basic function of such equipment . . . has not changed – the capacity to dial numbers without human intervention.’” *Id.*; see *Warnick v. Dish Network LLC*, 2014 WL 12537066, at \*12 (D. Col. 2014); *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011) (finding that even though the dialer at issue “cannot generate and dial random or sequential numbers, it is still an ‘automatic telephone dialing system,’ because the dialer “automatically dials numbers stored in [a database of numbers] routes answered calls to available collectors”). **“Therefore, because predictive dialers had the capacity to dial numbers without human intervention, the Commission concluded that they fell within the statutory definition of automatic telephone dialing system and the intent of Congress.”** *Id.*; see also *Warnick*, 2014 WL 12537066, at \*12; *Griffith*, 838 F. Supp. 2d at 727. In 2008, the FCC issued a declaratory ruling affirming the 2003 FCC Order. See *id.* (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 92-90, 23 FCC Red. 559 (2008) (“2008 FCC Ruling”). **Interpreting the 2008 FCC Ruling, the Ninth Circuit held in Meyer that “predictive dialers fall squarely within the FCC’s definition of ‘automatic telephone dialing system.’”** *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).

MSJ Order, Dkt. No. 167, at pp. 6:8-7:3 (emphasis added).

This Court concluded:

The record reflects that defendants used three dialers during the class period, namely (i) DAKCS/VIC, (ii) Global Connect, and (iii) TCN. **Plaintiffs offer the testimony of Rash Curtis executives who state DAKCS/VIC and TCN are predictive dialers.** (Dkt. No. 139-2, Declaration of Jeremy Krivoshey (“Krivoshey Decl.”), Ex. 1, Deposition of Daniel Correa (“Correa Dep.”) at 23:10-13 (DAKCS/VIC dialer), 30:9-21 (TCN dialer); Ex. 2, Deposition of Nick Keith (“Keith Dep.”) at 26:22-27:11 (DAKCS/VIC dialer).) **With regard to Global Connect, plaintiffs proffer that Global Connect offers “predictive” functionality and enables defendant to make ten simultaneous calls per agent to reach “thousands of contacts within minutes.”** (Dkt. No. 46-4, Declaration of Randall A. Snyder ¶ 39, Ex. C; Krivoshey Decl., Ex. 9.) **Further, defendant’s advertising materials highlight that**



**Rash Curtis uses “predictive dialers” to increase productivity.** (Krivoshey Decl. Ex. 9 at 8; Ex. 12 at 18.) **Accordingly, defendant’s Dialers “fall squarely within the FCC’s definition of ‘automatic telephone dialing system.’”** *Meyer*, 707 F.3d at 1043.

MSJ Order, Dkt. No. 167, at p.7:4-15 (emphasis added).

**B. The Court Found Rash Curtis is Liable for Four Phone Calls to Ms. McMillion.**

The parties also cross-moved for partial summary judgment on whether Rash Curtis possessed the Plaintiffs’ prior express consent to call her cell phone. (MSJ Order, Dkt. No. 167, p. 2:5.) The Court found Rash Curtis did not possess Ms. McMillion’s prior express consent for any calls placed *after* February 2, 2016, the date on which she first revoked her consent. (*Id.* at pp. 2:18-19; 8:26-10:9.)

A total of four phone calls were made to Ms. McMillion *after* February 2, 2016. The first two calls were made on February 16, 2016, and February 17, 2016. The last two calls were both made on January 25, 2017. (*See, e.g.*, Plaintiffs’ Supporting Separate Statement, Dkt. No. 139-1, Issue No. 7, Fact Nos. 33-35; *see also*, MSJ Order, Dkt. No. 167, p. 9:9-10.)

**C. The Court Found Rash Curtis is Liable for Two Phone Calls to Ms. Adekoya.**

The Court likewise found Rash Curtis did not possess Ms. Adekoya’s prior express consent for any calls placed *after* April 18, 2016, the date on which she first revoked her consent. (MSJ Order Dkt. No. 167, pp. 2:20-22; 10:10-11:13.)

Two phone calls were made to Ms. Adekoya *after* April 18, 2016: the first was made on April 27, 2016, and the second was made on April 28, 2016. (*See, e.g.*, Plaintiffs’ Supporting Separate Statement, Dkt. No. 139-1, Issue No. 5, Fact No. 29; *see also* MSJ Order, Dkt. No. 167, p. 11:2-3.)

**D. The Court Found Rash Curtis Never Possessed Prior Express Consent to Call Mr. Perez.**

The Court held that Rash Curtis did not possess Mr. Perez’s prior express consent for any of the calls placed to his cell phone number ending in 5193. (MSJ Order, Dkt. No. 167, pp. 3:1; 11:14-12:13.) The Court found that although non-party Daniel Reynoso voluntarily provided his cell phone number ending in 5193 to Sutter General Hospital, which, in turn, provided that number to Rash Curtis when it referred Mr. Reynoso’s account for collection, that consent did not follow the reassignment of the cell phone number to Mr. Perez. (MSJ Order, Dkt. No. 167, p. 11:16-19.)

Plaintiffs’ Complaint identified just four phone calls made to Mr. Perez, the last of which

1 occurred on June 7, 2016. (Rash Curtis' **Exhibit 1** in Opposition to Plaintiffs' Motion for Partial  
 2 Summary Judgment, Dkt. No. 152-9, p. 4, ¶ 7.) It was during this June 7, 2016 phone call that Rash  
 3 Curtis first spoke with Mr. Perez and learned that he now possessed the cell phone number ending in  
 4 5193. (Rash Curtis' **Exhibit 15** in Opposition to Plaintiffs' Motion for Partial Summary Judgment,  
 5 Dkt. No. 152-9, p. RCA 000271 (June 7, 2016 entry); Declaration of Bob Keith, Dkt. No. 152-3, ¶ 26;  
 6 Rash Curtis' **Exhibit 17** in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No.  
 7 152-10, Excerpts from Deposition of Ignacio Perez, at pp. 38:6-39:19.)

8 **E. The Court Found Rash Curtis Had No Liability under the FDCPA.**

9 The Court granted Rash Curtis' motion for partial summary judgment on each of the Plaintiffs'  
 10 individual claims under the Fair Debt Collection Practices Act. (MSJ Order, Dkt. No. 167, pp. 3:2,  
 11 13:1-15:17.) In short, there are no FDCPA claims left in this case.

12 **F. The Court Found Rash Curtis Had No Liability to Mr. Perez Under the Rosenthal Act.**

13 The Court also granted Rash Curtis' motion for partial summary judgment on Mr. Perez's  
 14 claims under California's Rosenthal Fair Debt Collection Practices Act, finding that Mr. Perez failed to  
 15 make a sufficient showing that Rash Curtis' "actual contact" occurred "with such frequency as to be  
 16 unreasonable and to constitute harassment to the debtor under the circumstances." (MSJ Order, Dkt.  
 17 No. 167, pp. 3:3-4; 16:1-5.)

18 The Court denied Rash Curtis' motion as to Ms. McMillion's and Ms. Adekoya's Rosenthal  
 19 Act claims, finding that triable issues of fact existed. (*Id.* at pp. 3:4-5; 16:6-17:8.)

20 **III. ARGUMENT**

21 **A. Rash Curtis Has No TCPA Liability to Any Plaintiff Because It Did Not Use an ATDS**  
 22 **and Did Not Leave Any Pre-Recorded or Artificial Messages.**

23 **1. Rash Curtis' Dialers Do Not Constitute ATDSs Because They Do Not Have the**  
 24 **Capacity to Store or Produce Phone Numbers Using a Random or Sequential**  
 25 **Number Generator.**

26 **a. *ACA International* Set Aside the FCC's Rulings Establishing Predictive**  
 27 **Dialers as ATDSs.**

28 In *ACA International*, *supra*, the D.C. Circuit Court of Appeals began by addressing "the  
 Commission's effort to clarify which sorts of calling equipment qualify as an ATDS so as to fall

1 subject to the general prohibition against making calls using such a device without consent.” *ACA*  
 2 *Int’l, supra*, 2018 WL 1352922, at \*4.

3 The court explained the scope of its review included more than just the FCC’s 2015 order:

4 **As a threshold matter, the Commission maintains that the court**  
 5 **lacks jurisdiction to entertain petitioners’ challenge concerning the**  
 6 **functions a device must be able to perform. The agency reasons that**  
 7 **the issue was resolved in prior agency orders—specifically,**  
 8 **declaratory rulings in 2003 and 2008 concluding that the statutory**  
 9 **definition of an ATDS includes “predictive dialers,” dialing**  
 10 **equipment that can make use of algorithms to “assist[ ]**  
 11 **telemarketers in predicting when a sales agent will be available to**  
 12 **take calls.” 2015 Declaratory Ruling, 30 FCC Rcd. at 7972 ¶ 10 n.39;**  
 13 **see also In re Rules and Regulations Implementing the Telephone**  
 14 **Consumer Protection Act of 1991 (2008 Declaratory Ruling), 23 FCC**  
 15 **Rcd. 559 (2008); 2003 Order, 18 FCC Rcd. 14,014. According to the**  
 16 **Commission, because there was no timely appeal from those**  
 17 **previous orders, it is too late now to raise a challenge by seeking**  
 18 **review of a more recent declaratory ruling that essentially ratifies**  
 19 **the previous ones. We disagree.**

20 **While the Commission’s latest ruling purports to reaffirm the prior**  
 21 **orders, that does not shield the agency’s pertinent pronouncements**  
 22 **from review. The agency’s prior rulings left significant uncertainty**  
 23 **about the precise functions an autodialer must have the capacity to**  
 24 **perform. Petitioners covered their bases by filing petitions for both a**  
 25 **declaratory ruling and a rulemaking concerning that issue and**  
 26 **related ones. See, e.g., Profl Ass’n for Customer Engagement, Inc. Pet.**  
 27 **3-4; ACA Int’l Pet. 6; GroupMe, Inc. Pet. 3; Glide Talk, Ltd. Pet. 13. In**  
 28 **response, the Commission issued a declaratory ruling that**  
 29 **purported to “provid[e] clarification on the definition of**  
 30 **‘autodialer,’” and denied the petitions for rulemaking on the issue.**  
 31 **2015 Declaratory Ruling, 30 FCC Rcd. at 8039 ¶ 165 & n.552. The**  
 32 **ruling is thus reviewable on both grounds. See 5 U.S.C. § 554(e);**  
 33 ***Biggerstaff v. FCC*, 511 F.3d 178, 184-85 (D.C. Cir. 2007).**

34 *ACA Int’l, supra*, 2018 WL 1352922, at \*10 (emphasis added).

35 Under the Administrative Procedures Act, the Court of Appeals reviewed the Commission’s  
 36 challenged orders to determine whether they were “arbitrary, capricious, an abuse of discretion, or  
 37 otherwise not in accordance with law.” *ACA Int’l, supra*, 2018 WL 1352992, at \*4 (quoting 5 U.S.C. §  
 38 706(2) and citing *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

39 With this standard of review in mind, the court shifted its focus to the statute’s plain language:

The statutory definition says that a device constitutes an ATDS if it has the capacity to perform both of two enumerated functions: “to store or produce telephone numbers to be called, using a random or sequential number generator”; and “to dial such numbers.” 47 U.S.C. § 227(a)(1)(A)-(B). The role of the phrase, “using a random or sequential number generator,” has generated substantial questions over the years. The Commission has sought to address those questions in previous orders and did so again in the 2015 Declaratory Ruling we consider here.

The Commission's most recent effort falls short of reasoned decisionmaking in “offer[ing] no meaningful guidance” to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions. *Postal Regulatory Comm'n*, 785 F.3d at 754. A basic question raised by the statutory definition is whether a device must *itself* have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere? The Commission's ruling appears to be of two minds on the issue.

In certain respects, the order conveys that equipment needs to have the ability to generate random or sequential numbers that it can then dial. The order twice states that, to “meet[ ] the TCPA's definition of ‘autodialer,’” the equipment in question must have the capacity to “dial random or sequential numbers.” 2015 Declaratory Ruling, 30 FCC Rcd. at 7972 ¶ 10; *see also id.* at 7974 ¶ 15. And it is clear from context that the order treats the ability to “dial random or sequential numbers” as the ability to *generate* and then dial “random or sequential numbers.”

*ACA Int'l*, *supra*, 2018 WL 1352922, at \*10-11 (emphasis added).

The court went on to distinguish dialing equipment which actually generated numbers using a random or sequential number generator from that which simply dialed numbers from a calling list:

To see why, it is helpful to understand that the ruling distinguishes between use of equipment to “dial random or sequential numbers” and use of equipment to “call[ ] a set list of consumers.” *Id.* at 7972 ¶ 10. Anytime phone numbers are dialed from a set list, the database of numbers must be called in *some* order—either in a random or some other sequence. As a result, the ruling's reference to “dialing random or sequential numbers” cannot simply mean dialing from a set list of numbers in random or other sequential order: if that were so, there would be no difference between “dialing random or sequential numbers” and “dialing a set list of numbers,” even though the ruling draws a



1 divide between the two. *See id.* at 7973 ¶¶ 13, 14. It follows that the  
 2 ruling's reference to "dialing random or sequential numbers" means  
 3 generating those numbers and then dialing them.

4 The Commission's prior declaratory rulings reinforce that understanding.  
 5 In its 2003 ruling addressing predictive dialers, the Commission  
 6 observed that, "[i]n the past, telemarketers may have used dialing  
 7 equipment to *create and dial* 10-digit telephone numbers  
 8 arbitrarily." 2003 Order, 18 FCC Rcd. at 14,092 ¶ 132 (emphasis  
 9 added). But the industry had "progressed to the point where" it had  
 10 become "far more cost effective" instead to "us[e] lists of numbers."  
 11 *Id.* Again, the Commission suggested it saw a difference between  
 12 calling from a list of numbers, on one hand, and "creating and  
 13 dialing" a random or arbitrary list of numbers, on the other hand.  
 14 Or as the Commission has elsewhere said, numbers that are  
 15 "randomly or sequentially generated" differ from numbers that  
 16 "come from a calling list."

17 *ACA Int'l, supra*, 2018 WL 1352922, at \*10-11 (emphasis added).

18 The court then addressed the FCC's inclusion of "predictive dialers" as ATDSs:

19 While the 2015 ruling indicates in certain places that a device must  
 20 be able to generate and dial random or sequential numbers to meet  
 21 the TCPA's definition of an autodialer, it also suggests a competing  
 22 view: that equipment can meet the statutory definition even if it  
 23 lacks that capacity[... ] By reaffirming that conclusion in its 2015  
 24 ruling, the Commission supported the notion that a device can be  
 25 considered an autodialer even if it has no capacity itself to generate  
 26 random or sequential numbers (and instead can only dial from an  
 27 externally supplied set of numbers). The 2015 ruling  
 28 correspondingly expresses that "predictive dialers" can differ from  
 other "dialers that utilize random or sequential numbers instead of  
 a list of numbers." 2015 Declaratory Ruling, 30 FCC Rcd. at 7973 ¶  
 14.

So which is it: does a device qualify as an ATDS only if it can generate  
 random or sequential numbers to be dialed, or can it so qualify even if it  
 lacks that capacity? The 2015 ruling, while speaking to the question  
 in several ways, gives no clear answer (and in fact seems to give both  
 answers). It might be permissible for the Commission to adopt  
 either interpretation. But the Commission cannot, consistent with  
reasoned decisionmaking, espouse both competing interpretations in  
the same order.

The choice between the interpretations is not without practical  
 significance. Petitioners and various amici describe calling equipment  
 that they wish to use to call set lists of cellular numbers without any

1 generation of random or sequential numbers. *See* ACA Int'l Reply Br.  
 2 21; Am. Bankers Ass'n Amicus Br. 29-30. **And at least some predictive**  
 3 **dialers, as explained, have no capacity to generate random or**  
 4 **sequential numbers.**

5 *ACA Int'l, supra*, 2018 WL 1352922, at \*11-12 (emphasis added).

6 Finally, the court set aside the FCC's ruling on the grounds that it failed to satisfy the  
 7 requirement of reasoned decisionmaking:

8 The uncertainty in the 2015 ruling, moreover, does not stop with the  
 9 question of whether a device must be able to generate random or  
 10 sequential numbers to meet the statutory definition. **The ruling is also**  
 11 **unclear about whether certain other referenced capabilities are**  
 12 **necessary for a dialer to qualify as an ATDS.**

13 [...]

14 But the Commission nevertheless declined a request to "clarify[ ] that a  
 15 dialer is not an autodialer unless it has the capacity to dial numbers  
 16 without human intervention." 2015 Declaratory Ruling, 30 FCC Rcd. at  
 17 7976 ¶ 20. **According to the Commission, then, the "basic function"**  
 18 **of an autodialer is to dial numbers without human intervention, but**  
 19 **a device might still qualify as an autodialer even if it cannot dial**  
 20 **numbers without human intervention.** Those side-by-side  
 21 propositions are difficult to square.

22 The Commission further said that another "basic function[ ]" of an  
 23 ATDS is to "dial thousands of numbers in a short period of time."  
 24 *Id.* at 7975 ¶ 17. But the ruling imparts no additional guidance  
 25 concerning whether that is a necessary condition, a sufficient  
 26 condition, a relevant condition even if neither necessary nor  
 27 sufficient, or something else. Nor does it indicate what would qualify  
 28 as a "short period of time." **Again, affected parties are left in a**  
 significant fog of uncertainty about how to determine if a device is  
 an ATDS so as to bring into play the restrictions on unconsented  
 calls.

In short, the Commission's ruling, in describing the functions a  
 device must perform to qualify as an autodialer, fails to satisfy the  
 requirement of reasoned decisionmaking. The order's lack of clarity  
 about which functions qualify a device as an autodialer compounds  
 the unreasonableness of the Commission's expansive understanding  
 of when a device has the "capacity" to perform the necessary  
 functions. **We must therefore set aside the Commission's treatment**  
**of those matters.**



1 *ACA Int'l, supra*, 2018 WL 1352922, at \*11-12 (emphasis added).

2 In sum, by setting aside the Commission's rulings, the United States Court of Appeals removed  
3 "predictive dialers," as well as dialers which "operate without human intervention," from the list of  
4 telephone dialing equipment which constitute ATDSs. (*See, e.g.*, MSJ Order, p. 7:20-22 ("*ACA*  
5 *International* concerns a related issue, namely whether the 2003 FCC Order and 2008 FCC Ruling  
6 which indicate that predictive dialers constitute ATDSs are unlawful on due process grounds and under  
7 the Administrative Procedure Act.").)

8 As noted *ante*, however, this Court's finding that Rash Curtis' dialers were ATDSs was based  
9 solely on their capability to "predictively" dial phone numbers "without human intervention." (MSJ  
10 Order, Dkt. No. 167, p. 2:16-17.) Accordingly, reconsideration of this issue is appropriate.

11 **b. The Plain Language of the TCPA Requires an ATDS Have the Capacity to**  
12 **Store or Produce Phone Numbers Using a Random or Sequential Number**  
13 **Generator.**

14 Parsing the language of the TCPA, the statute provides: "It shall be unlawful ... to make any  
15 call (other than a call ... made with the prior express consent of the party called) using any  
16 automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number  
17 assigned to a ... cellular telephone service, ... or any service for which the called party is charged for  
18 the call." 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

19 In other words, "[t]he three elements of a TCPA claims are: (1) the defendant called a cellular  
20 telephone number; (2) using an automatic telephone dialing system; (3) without the called party's  
21 prior express consent." *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9<sup>th</sup> Cir.  
22 2012) ("the clear language of the TCPA 'mandates that the focus must be on whether the equipment  
23 has the *capacity* 'to store or produce telephone numbers to be called, using a random or sequential  
24 number generator.'") (emphasis added).

25 In the aftermath of *ACA International*, Plaintiffs now have the burden of establishing the *prima*  
26 *facie* element of the use of an ATDS without the luxury of relying on the "predictive dialing"  
27 capabilities of Rash Curtis' dialers. *ACA Int'l, supra*, 2018 WL 1352992, at \*10-12 (setting aside  
28 FCC's rulings on which functions qualify a device as an ATDS as unreasonable). In other words, they

1 **must** show that each of Rash Curtis' dialers produces, that is, creates or generates, the telephone  
 2 numbers it calls **using a random or sequential number generator**.

3 c. **Rash Curtis' Dialers Do Not Have the Capacity to Store or Produce**  
 4 **Telephone Numbers Using a Random or Sequential Number Generator.**

5 In opposition to Plaintiffs' motion, both of Rash Curtis' Executive Vice Presidents, Bob Keith  
 6 and Chris Paff, testified that:

7 During the relevant time periods of the class, including during the  
 8 collection communications made by Rash Curtis to Plaintiffs, Rash  
 9 Curtis employed three different telephone dialing systems: (1) VIC; (2)  
 10 Global Connect; and (3) TCN. **None of Rash Curtis' telephone**  
 11 **dialing systems contain an active random or sequential number**  
 12 **generator which can dial numbers**. Rather, these platforms only  
 13 dial phone numbers from a pre-generated list compiled by an  
 14 individual.

12 (Declaration of Bob Keith, Dkt. No. 152-3, ¶ 32 (emphasis added); Declaration of Chris Paff, Dkt. No.  
 13 152-4, ¶ 2 (emphasis added).)

14 The Plaintiffs' "star witness," Mr. Steven Kizer, admitted under oath that Rash Curtis' dialers  
 15 cannot store or produce telephone numbers, using a random or sequential number generator, and then  
 16 dial them:

17 Q: And with Global Connect do you know whether or not either the  
 18 hardware or the software had an automated dialing system that either  
 19 generated sequentially or randomly a number? Do you know one way or  
 20 the other.

21 A: I am going to tell you that my understanding of that system, **it did not**  
 22 **generate a number. Numbers had to be fed to it.**

23 Q: Right. So your understanding –

24 A: Uh-huh.

25 Q: -- because I have read your deposition, and this is exactly what you  
 26 testified, is that someone in management had to load a series of numbers  
 27 from various accounts into the system and then it would dial. The  
 28 system itself would not generate the number, would it?

A: **No. That is correct. Management had to load the numbers in.**

Q: And, and, in fact, management would come up with how it was going to

1 fit a particular campaign on a particular day and that was all done by a  
 2 manager, it was not done by the computer system using an algorithm,  
 was it?

3 A: Correct.

4 (**Exhibit A**, Excerpts from Deposition Transcript of Steven Kizer, p. 91:2-92:1; *see also Exhibit B*,  
 5 Excerpts from Deposition Transcript of Steven Kizer, p. 270:12-19 (Rash Curtis' VIC dialer also had  
 6 to be "loaded with phone numbers").)

7 In light of the foregoing, Rash Curtis respectfully requests this Court deny Plaintiffs' motion  
 8 for partial summary judgment on the issue of whether Rash Curtis' dialers constitute ATDSs on the  
 9 basis that they do not possess the "capacity to store or produce telephone numbers to be called, using a  
 10 random or sequential number generator," as required by the plain language of the statute. 47 U.S.C. §  
 11 227(a)(1).<sup>1</sup>

12 **2. Rash Curtis Did Not Leave Pre-Recorded or Artificial Voice Messages on Any of**  
 13 **the Plaintiffs' Cell Phones.**

14 As this Court correctly noted, "even if the FCC's Orders are overturned, defendant could still  
 15 face liability if plaintiffs show that defendant made calls using prerecorded messages or artificial  
 16 voices which are not at issue in *ACA International*." (MSJ Order, Dkt. No. 167, pp. 7:27-8:1.)

17 Indeed, the TCPA makes it unlawful to "make any call (other than a call made for emergency  
 18 purposes or made with the prior express consent of the called party) using any automatic telephone  
 19 dialing system or an artificial or prerecorded voice..." 47 U.S.C. § 227(b)(1)(A) (emphasis added).

20 Therefore, although Rash Curtis cannot be held liable for using a "predictive dialer" (*ACA Int'l*,  
 21 *supra*, 2018 WL 1352922, at \*10-12), it may still be liable if it left an artificial or prerecorded voice  
 22 message during any of the calls for which it did not possess the called party's prior express consent.  
 23 47 U.S.C. § 227(b)(1)(A). Rash Curtis' collection notes and call logs demonstrate it did not leave any  
 24 messages using an "artificial or pre-recorded voice." (Supplemental Declaration of Bob Keith, ¶¶ 3-9.)

25 \_\_\_\_\_  
 26 <sup>1</sup> Rash Curtis notes it did not move for summary judgment on this issue. However, at the time the  
 27 motions were filed, predictive dialers were still considered to be ATDSs under the FCC's relevant  
 28 orders. Now that predictive dialing technology is not, without more, enough to render dialing  
 equipment an ATDS, Rash Curtis submits this Court should either: (1) grant Rash Curtis partial  
 summary judgment on this issue, or (2) grant Rash Curtis leave to file a second motion for summary  
 judgment on this issue.

a. **Rash Curtis Did Not Use an Artificial or Prerecorded Voice During Any of the Calls Made Without the Plaintiffs' Prior Express Consent.**

i. **The Four Remaining Phone Calls to Ms. McMillion.**

As noted, this Court previously held that Rash Curtis possessed Ms. McMillion's prior express consent for all calls placed on or before February 2, 2016. (MSJ Order, pp. 2:18-19; 8:26-10:9.) Thus, the only remaining calls for which Rash Curtis faces potential liability occurred on February 16, 2016, February 17, 2016, and January 25, 2017 (two calls). (*See, e.g.*, Plaintiffs' Supporting Separate Statement, Dkt. No. 139-1, Issue No. 7, Fact Nos. 33-35; *see also* MSJ Order, p. 9:9-10.)

Rash Curtis' collection notes and call logs conclusively demonstrate that no artificial or prerecorded voice messages were left during any of these four calls.

(1) **The February 16, 2016 Call:**

Rash Curtis' collection notes for this entry provide:

**"GC021616:09:25 4156320589-PHONE ANSWERD [SIC] NO LINKBACK"**

(Rash Curtis' **Exhibit 3** in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 152-9, p. RCA 000227 (February 16, 2016 entry).)

The first two letters, "GC," mean the call was placed using Global Connect. (Supplemental Declaration of Bob Keith, ¶ 3.) The next ten digits, "021616:09:25," mean the call was placed on February 16, 2016 at 09:25 hours, or 9:25 a.m. (*Id.*) The next ten digits, "4156320589," mean the call was placed to phone number (415) 632-0589. (*Id.*) The phrase "Phone Answered No Linkback" means that either Ms. McMillion or her voicemail answered the call, but the Global Connect dialer did not detect any live person on the other end, and therefore terminated the call without leaving a pre-recorded or artificial voice message on her voicemail. (*Id.*)

(2) **The February 17, 2016 Call:**

Rash Curtis' collection notes for this entry read:

**"GC021716:16:13 4156320589-PHONE ANSWERD [SIC] NO LINKBACK"**

(Rash Curtis' **Exhibit 3** in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 152-9, p. RCA 000227 (February 17, 2016 entry).)

The first two letters, "GC," mean the call was placed using Global Connect. (Supplemental

Declaration of Bob Keith, ¶ 4.) The next ten digits, “021716:16:13,” mean the call was placed on February 16, 2016 at 16:13 hours, or 4:13 p.m. (*Id.*) The next ten digits, “4156320589,” mean the call was placed to phone number (415) 632-0589. (*Id.*) The phrase “Phone Answered No Linkback” means that either Ms. McMillion or her voicemail answered the call, but the Global Connect dialer did not detect any live person on the other end, and therefore terminated the call without leaving a pre-recorded or artificial voice message on her voicemail. (*Id.*)

**(3) The First February 25, 2017 Call:**

Rash Curtis’ collection notes do not show calls made to Ms. McMillion on February 25, 2017. (Supplemental Declaration of Bob Keith, ¶ 5.) However, Rash Curtis’ TCN call logs show that a call was made on February 25, 2017 at approximately 11:42 a.m. (*Id.*) The call result was a “machine hang-up.” (*Id.*) This means that the TCN dialer detected that Ms. McMillion’s voicemail answered the call, and it terminated the call without leaving a pre-recorded artificial or message on her voicemail. (*Id.*)

**(4) The Second February 25, 2017 Call:**

Rash Curtis’ TCN call logs show that the second February 25, 2017 call was made at approximately 12:49 a.m. (Supplemental Declaration of Bob Keith, ¶ 6.) The call result was a “machine hang-up.” (*Id.*) This means that the TCN dialer detected that Ms. McMillion’s voicemail answered the call, and it terminated the call without leaving a pre-recorded or artificial message on her voicemail. (*Id.*)

In sum, Rash Curtis did not leave any pre-recorded or artificial messages on Ms. McMillion’s cell phone without her prior express consent. (*Id.* at ¶¶ 3-6.)

**ii. The Two Remaining Calls to Ms. Adekoya:**

This Court found Rash Curtis possessed Ms. Adekoya’s prior express consent for all calls placed on or before April 18, 2016, but it did not possess her prior express consent for any calls placed after that date. (MSJ Order, pp. 2:20-22; 10:10-11:13.) Just two phone calls were made to Ms. Adekoya’s cell phone number after April 18, 2016; the first was made on April 27, 2016, and the second was made on April 28, 2016. (*See, e.g.*, Plaintiffs’ Supporting Separate Statement, Dkt. No.



139-1, Issue No. 5, Fact No. 29; *see also* MSJ Order, p. 11:2-3.)

(1) **The April 27, 2016 Call:**

Rash Curtis' collection notes for this entry show:

**"GC042716:16:32 5106925496-PHONE ANSWERD [SIC] NO LINKBACK"**

(Rash Curtis' **Exhibit 7** in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 152-9, p. RCA 000263 (April 27, 2016 entry).)

The first two letters, "GC," mean the call was placed by Global Connect. (Supplemental Declaration of Bob Keith, ¶ 7.) The next ten digits, "042716:16:32," mean the call was placed on April 27, 2016 at 16:32 hours, or 4:32 p.m. (*Id.*) The next ten digits, "5106925496," mean the call was placed to phone number (510) 692-5496. (*Id.*) The phrase "Phone Answered No Linkback" means that either Ms. Adekoya or her voicemail answered the call, but the Global Connect dialer did not detect any live person on the other end, and therefore terminated the call without leaving a pre-recorded or artificial voice message on her voicemail. (*Id.*)

(2) **The April 28, 2016 Call:**

Rash Curtis' collection notes for this entry indicate:

**"GC042816:18:18 5106925496-PHONE ANSWERD NO LINKBACK"**

(Rash Curtis' **Exhibit 7** in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 152-9, p. RCA 000263 (April 28, 2016 entry).)

The first two letters, "GC," mean the call was placed using Global Connect. (Supplemental Declaration of Bob Keith, ¶ 8.) The next ten digits, "042816:18:18," mean the call was placed on April 28, 2016 at 18:18 hours, or 6:18 p.m. (*Id.*) The next ten digits, "5106925496," mean the call was placed to phone number (510) 692-5496. (*Id.*) The phrase "Phone Answered No Linkback" means that either Ms. Adekoya or her voicemail answered the call, but the Global Connect dialer did not detect any live person on the other end, and therefore terminated the call without leaving a pre-recorded or artificial voice message on her voicemail. (*Id.*)

In sum, Rash Curtis did not leave any pre-recorded or artificial messages on Ms. Adekoya's cell phone without her prior express consent. (*Id.* at ¶¶ 7-8.)



iii. **The Calls to Mr. Perez.**

None of Rash Curtis' records indicate that any pre-recorded or artificial voice messages were ever left on Mr. Perez's voicemail. (Supplemental Declaration of Bob Keith, ¶ 9; Rash Curtis' **Exhibit 15** in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 152-9, pp. RCA 000270-271.) To the contrary, several entries list the following call result: "NML – MACHINE." "No Message Left" means the Global Connect dialer detected an answering machine or voicemail and terminated the call **without** leaving a pre-recorded or artificial voice message on his voicemail. (Supplemental Declaration of Bob Keith, ¶ 9.) Other call results indicate several calls were "skipped," meaning not made, the number dialed was "busy," or "invalid," or the call was answered but there was no "linkback," meaning the Global Connect dialer did not detect a live person on the other end, and therefore terminated the call **without leaving any pre-recorded or artificial voice message on Mr. Perez's voicemail.** (*Id.*)

**B. Rash Curtis Separately Has No TCPA Liability for Any Calls to Mr. Perez Because It Immediately Stopped Calling Upon First Learning the Number Had Been Ported to Mr. Perez.**

**1. ACA International Set Aside the FCC's Rulings Regarding Reassigned Numbers.**

In *ACA International, supra*, the United States Court of Appeals, D.C. Circuit also examined the Commission's rulings regarding when a caller violates the TCPA by calling a wireless number previously held by a consenting party but reassigned ("ported") to a person who has not given consent:

**We now turn to the Commission's treatment of circumstances in which a consenting party's cell number has been reassigned to another person.** While there is no consensus about the exact numbers of reassignments, **there is no dispute that millions of wireless numbers are reassigned each year.** In the event of a reassignment, the caller might initiate a phone call (or send a text message) based on a mistaken belief that the owner of the receiving number has given consent, when in fact the number has been reassigned to someone else from whom consent has not been obtained. **Does a call or message in that situation violate the statutory bar against making autodialer calls without prior consent? The Commission's answer is yes, apart from a one-call, post-reassignment safe harbor. We set aside the Commission's interpretation on the ground that the one-call safe harbor is arbitrary and capricious.**

1 *ACA Int'l, supra*, 2018 WL 1352992, at \*13 (emphasis added).

2 As the court explained:

3 The pertinent statutory language generally renders it unlawful “to make  
4 any call (other than a call made for emergency purposes or made with  
5 the *prior express consent of the called party*) using any automatic  
6 telephone dialing equipment or prerecorded voice.” 47 U.S.C. §  
7 227(b)(1)(A) (emphasis added). **The Commission, in its ruling,**  
8 **initially addressed who is properly considered the “called party”**  
9 **when a consenting party's number is reassigned to another person:**  
10 **does “called party” refer to the person the caller expected to reach**  
11 **(whose consent had previously been obtained), or does it refer to the**  
12 **person actually reached, the wireless number's present-day**  
13 **subscriber after reassignment (whose consent has not been**  
14 **obtained)?**

15 **The Commission adopted the latter interpretation.** 30 FCC Rcd. at  
16 7999-8001 ¶¶ 72-73. **The result is that the reassignment of a wireless**  
17 **number extinguishes any consent given by the number's previous**  
18 **holder and exposes the caller to liability for reaching a party who**  
19 **has not given consent.** An alternative approach, the Commission  
20 reasoned, would “effectively require consumers to opt out of such calls  
21 when the TCPA clearly requires the opposite—that consumers opt in  
22 before they can be contacted.” *Id.* at 8004 ¶ 80.

23 The agency also refused to “place any affirmative obligation” on new  
24 subscribers to inform callers that a wireless number now belongs to  
25 someone else. *Id.* at 8011 ¶ 95. **The ruling thus expressly**  
26 **contemplates that a new subscriber could “purposefully and**  
27 **unreasonably” refrain from informing a good-faith caller about a**  
28 **number's reassignment “in order to accrue statutory penalties.”** *Id.*  
(formatting modified). In that regard, the Commission described a  
reported case in which the new, post-reassignment subscriber  
waited to initiate a lawsuit until after having received almost 900  
text alerts that were intended for the previous subscriber. *Id.* at 8011  
¶ 94 & n.324.

[...]

24 *ACA Int'l, supra*, 2018 WL 1352992, at \*14 (emphasis added).

25 The court continued:

26 **Petitioners next argue that the Commission's one-call safe harbor is**  
27 **arbitrary. On this score, we agree with petitioners.** When a caller is  
28 **unaware that a consenting party's wireless number has been**  
**reassigned, the Commission chose to allow the caller to make one**

(and only one) post-reassignment call without incurring liability. For that one call, the Commission understood the statutory term “prior express consent” to refer to the consent given by the previous subscriber. 30 FCC Rcd. at 8001 ¶ 73 & n.265; *id.* at 8003 ¶ 78.

The Commission allowed for that one liability-free call, rather than impose “a traditional strict liability standard,” because it interpreted a caller’s ability under the statute to rely on a recipient’s “prior express consent” to “mean reasonable reliance.” *Id.* at 8009 ¶ 90 n.312. And when a caller has no knowledge of a reassignment, the Commission understandably viewed the caller’s continued reliance on the prior subscriber’s consent to be “reasonable.”

Elsewhere in the Declaratory Ruling, the Commission echoed the same “reasonable reliance” understanding of the statute’s approval of calls based on “prior express consent.” The ruling accepts that a caller can rely on consent given by a wireless number’s “customary user” (“such as a close relative on a subscriber’s family calling plan”), rather than by the subscriber herself. *Id.* at 8001 ¶ 75. That is because the “caller in this situation cannot reasonably be expected to divine that the consenting person is not the subscriber.” *Id.* at 8001-02 ¶ 75. **The Commission reiterated in that regard that, in “construing the term ‘prior express consent’ in section 227(b)(1)(A), we consider the caller’s reasonableness in relying on consent.”** *Id.* at 8001 ¶ 75.

*ACA Int’l, supra*, 2018 WL 1352992, at \*15 (emphasis added).

The court also noted:

**The Commission thus consistently adopted a “reasonable reliance” approach when interpreting the TCPA’s approval of calls based on “prior express consent,” including as the justification for allowing a one-call safe harbor when a consenting party’s number is reassigned. The Commission, though, gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message. That is, why does a caller’s reasonable reliance on a previous subscriber’s consent necessarily cease to be reasonable once there has been a single, post-reassignment call?** The first call or text message, after all, might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would often be the case with or without a reassignment).

[...]

The Commission acknowledged that callers “may nevertheless not learn of reassignment before placing a call to a new subscriber,” and that the first post-reassignment call likewise might give no reason to suspect a reassignment. *Id.* at 8009 ¶¶ 88, 90 n.312. In that event, a

caller's reasonable reliance on the previous subscriber's consent would be just as reasonable for a second call.

[...]

In that light, no cognizable conception of "reasonable reliance" supports the Commission's blanket, one-call-only allowance.

*ACA Int'l, supra*, 2018 WL 1352992, at \*15-16 (emphasis added).

On this issue, the court concluded:

[T]he Commission's one-call-only approach cannot be salvaged by its suggestion that callers rather than new subscribers should bear the risk when calls are made (or messages are sent) to a reassigned number. *Id.* at 8009-10 ¶ 90 n.312. That consideration would equally support a zero-call, strict-liability rule. But the Commission specifically declined to adopt "a result that severe." *Id.* Having instead embraced an interpretation of the statutory phrase "prior express consent" grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message. The Commission did not do so.

Finally, the Commission's failure in that regard requires setting aside not only its allowance of a one-call safe harbor, but also its treatment of reassigned numbers more generally. When we invalidate a specific aspect of an agency's action, we leave related components of the agency's action standing only if "we can say without any 'substantial doubt' that the agency would have adopted the severed portion on its own." *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017) (per curiam) (internal quotation marks omitted).

Here, we have no such assurance. If we were to excise the Commission's one-call safe harbor alone, that would leave in place the Commission's interpretation that "called party" refers to the new subscriber. And that in turn would mean that a caller is strictly liable for *all* calls made to the reassigned number, even if she has no knowledge of the reassignment.

We cannot be certain that the agency would have adopted that rule in the first instance. Significantly, the Commission said that it "could have interpreted the TCPA to impose a traditional strict liability standard," i.e., "a 'zero call' approach." 30 FCC Rcd. at 8009 ¶ 90 n.312. But the agency declined to "require a result that severe," opting instead for a one-call safe harbor. *Id.* We cannot say without any substantial doubt that the agency would have embraced the



1 “severe” implications of a pure, strict-liability regime even in the  
 2 absence of any safe harbor. As a result, we must set aside the  
Commission's treatment of reassigned numbers as a whole.

3 *ACA Int'l, supra*, 2018 WL 1352992, at \*16-17 (emphasis added).

4 In sum, the D.C. Circuit set aside the Commission's treatment of reassigned numbers as a  
 5 whole, finding that it could not do away with the arbitrary, one-call safe harbor without imposing  
 6 absolute, strict liability for every call made to a reassigned number, an outcome expressly rejected by  
 7 the Commission itself. (*Id.*)

8 It remains unclear exactly what effect this ruling may have in the long run, but the key point to  
 9 take from this is that the United States Court of Appeals confirmed the Commission's embraces of “an  
 10 interpretation of the statutory phrase ‘prior express consent’ grounded in conceptions of reasonable  
 11 reliance.” *ACA Int'l, supra*, 2018 WL 1352992, at \*16 (emphasis added).

12 The United States Court of Appeals found that the one-call safe harbor was not reasonably  
 13 grounded in such principles of “reasonable reliance” because a caller could not reasonably expect to  
 14 learn that a number had been reassigned where, as Mr. Perez did here, the new subscriber fails to  
 15 answer the first, liability-free call and inform the caller of the reassignment.

16 Here, Rash Curtis submits that it might be reasonable to expect a caller (such as Rash Curtis) to  
 17 learn that a cell phone number had been reassigned during the first actual conversation with the new  
 18 subscriber or customary user of the recently-reassigned cell phone number, assuming of course that he  
 19 or she actually informed the caller of the reassignment during that first conversation (again, just as Mr.  
 20 Perez did here). At that point, a caller's reliance on the previous subscriber's prior express consent  
 21 could no longer be considered “reasonable.” *ACA Int'l, supra*, 2018 WL 1352922, at \*14.

## 22 **2. Rash Curtis Reasonably Relied Upon Mr. Reynoso's Prior Express Consent.**

23 Rash Curtis received Mr. Reynoso's account for collection from Sutter General Hospital on  
 24 May 7, 2015. (Declaration of Bob Keith, Dkt. No. 152-3, ¶ 25.) With the account, Sutter General  
 25 Hospital provided Rash Curtis with his cell phone number it had been given, ending in 5193. (*Id.*)

26 As explained above, Rash Curtis was finally able to reach someone at the 5193 number on June  
 27 7, 2016. (Declaration of Bob Keith, Dkt. No. 152-3, ¶ 26.) That person was Mr. Perez. (*Id.*) Mr.  
 28

1 Perez informed Rash Curtis that he was not the debtor (Mr. Reynoso) and asked Rash Curtis to stop  
 2 calling him. (*Id.*) And it did; that same day Rash Curtis removed the 5193 number from its collection  
 3 software and never called Mr. Perez again. (*Id.*)

4 At all times, Rash Curtis was reasonably relying upon the “prior express consent” provided by  
 5 Mr. Reynoso when he supplied the cell phone number ending in 5193 to Sutter General Hospital.  
 6 (Supplemental Declaration of Bob Keith, ¶ 10; *see ACA Int’l, supra*, 2018 WL 1352992, at \*15.) As  
 7 soon as Rash Curtis became aware that the number had been reassigned to Mr. Perez, it immediately  
 8 took action to ensure that the number was removed from its database, and it was never called again.  
 9 (*Id.*)

10 Consistent with the foregoing, and with Commission’s embrace of an interpretation of the  
 11 statutory phrase “prior express consent” grounded in conceptions of “reasonable reliance,” Rash Curtis  
 12 submits it has no TCPA liability to Mr. Perez because it was at all times acting with a good-faith belief  
 13 that it possessed valid prior express consent to call the cell phone number ending in 5193. *See, e.g.,*  
 14 *Chyba v. First Financial Asset Management, Inc.*, 2014 WL 1744136, at \*11-12 (S.D. Cal. April 30,  
 15 2014), *aff’d*, 671 Fed.Appx. 989 (9<sup>th</sup> Cir. 2016).

16 In *Chyba*, the District Court in and for the Southern District of California stated:

17 In the context of FDCPA, the Ninth Circuit has found that debt  
 18 collectors have a limited obligation to verify the underlying debt. **In**  
 19 ***Clark v. Capital Credit & Collection Services*, 460 F.3d 1162, 1174**  
 20 **(9<sup>th</sup> Cir.2005), the Ninth Circuit found that a debt collector was**  
 21 **entitled to rely on the creditor statement's to verify the debt. The**  
 22 **Ninth Circuit cited to case law suggesting that a collector could**  
 23 **reasonably rely upon information provided by a creditor who had**  
 24 **been accurate in the past. *Id.* It also held that the FDCPA did not**  
 25 **impose any duty on the debt collector to independently investigate the**  
 26 **claims. *Id.* (citations omitted). It would be incongruous with the larger**  
 27 **statutory and regulatory scheme to interpret [the] TCPA to require**  
 28 **that a debt collector be liable for acting where it had a good-faith**  
**basis for doing so.**

25 Here, the documents provided gave Defendant a good-faith basis to  
 26 believe that it had consent to contact Plaintiff at that number. The  
 27 Court notes that the cell number listed as her “home” number. There  
 28 appears to have been little that the Defendant could have done to  
 further ascertain whether there was consent, except to call Plaintiff  
 at her home number...



Thus, although Plaintiff did not give consent directly to Defendant to call her cell phone number, *it is sufficient that Defendant had a good-faith basis to believe that Plaintiff had provided consent to the creditor on whose behalf Defendant sought to collect a debt. Even if Plaintiff is correct in stating that she never gave Defendant or Enterprise consent to call, and there was no actual prior consent from Plaintiff, Defendant is not liable for acting in good faith upon the information provided to it.*

*Chyba, supra*, 2014 WL 1744136, at \*11-12 (emphasis added).

And so it is here.

Under *Chyba*, Rash Curtis possessed a good faith belief that it had prior express consent to contact Mr. Reynoso at the cell phone number ending in 5193. (Supplemental Declaration of Bob Keith, ¶ 10.) The fact that the number had been reassigned to Mr. Perez was unknown to Rash Curtis until June 7, 2016, when it was finally able to first speak with Mr. Perez. (Declaration of Bob Keith, Dkt. No. 152-3, ¶ 26.) Following that conversation, Rash Curtis no longer had a good faith belief that it had prior express consent to reach Mr. Reynoso at the cell phone number ending in 5193, so it stopped calling. (*Id.*; Rash Curtis' **Exhibit 17** in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 152-10, Excerpts from Deposition of Ignacio Perez, at pp. 38:6-39:19.)

Under the reasoning of *Chyba*, and the new *ACA International* decision confirming the Commission's embrace of principles of "reasonable reliance" when it comes to "prior express consent," Rash Curtis submits it cannot be held liable for mistakenly calling Mr. Perez while trying in good faith to reach Mr. Reynoso at a cell phone number which he provided but which was later reassigned without notice to Rash Curtis.

#### IV. CONCLUSION

Rash Curtis is not a telemarketing business; it does not want to talk to random people. To the contrary, it only wants to contact the specific debtors for whom it has been referred collection accounts. Rash Curtis simply has no use for an automatic telephone dialing system which uses a random or sequential number generator to produce, store and dial telephone numbers for random

1 individuals.<sup>2</sup> Rash Curtis' collection system is not set up to function that way, and it does not have the  
 2 capacity to do so, even if Rash Curtis wanted to (which it does not).

3 In truth, Rash Curtis has a hard-enough time trying to reach the people it actually wants to  
 4 contact; the same people who refuse to pay their medical bills and then dodge the bill collector's calls  
 5 for weeks, months, or, in some cases, even years. Rash Curtis' job is only further complicated by the  
 6 fact that millions of cell phone numbers are reassigned every year.

7 The TCPA's strict liability standard coupled with its "adding-machine" remedy has created a  
 8 niche market for consumer attorneys looking to "hit it big" in California's next "gold rush." Law firms  
 9 are working with software and telecommunications companies to develop cell phone applications (like  
 10 the ones used here) to allow consumers to track, save, and report telemarketing and debt collection  
 11 calls. Consumer attorneys, like Mr. Krivoshey, post videos to YouTube explaining how to "cash in"  
 12 on unwanted telemarketing calls.<sup>3</sup> Plaintiffs file complaints (like the one here) alleging they never  
 13 gave prior express consent to be called, even though we now know those allegations were false as to  
 14 both Ms. McMillion and Ms. Adekoya.

15 Based on the foregoing, Rash Curtis hereby respectfully requests this Court reconsider its order  
 16 on the parties' cross-motions for summary judgment. In particular, Rash Curtis asks this Court to:

- 17 5. Deny Plaintiffs' Motion for Partial Summary Judgment on the issue of whether Rash  
 18 Curtis' three dialers (Global Connect, TCN, and DAKCS/VIC) constitute ATDSs;
- 19 6. Grant Partial Summary Judgment to Rash Curtis on the issue of whether Rash Curtis'  
 20 three dialers do not constitute ATDSs because, although they are "predictive dialers,"  
 21 they do not have the capacity to store or produce telephone numbers using a random or  
 22 sequential number generator, and to dial such numbers (without human intervention);
- 23 7. Grant Partial Summary Judgment to Rash Curtis on the issue of TCPA liability based on  
 24 the fact that none of the calls which were placed without prior express consent were  
 25 done so using an ATDS or a pre-recorded or artificial voice; and

26  
 27 <sup>2</sup> Visit [https://youtu.be/zb1r\\_uKOew4](https://youtu.be/zb1r_uKOew4) for an example of an automatic telephone dialing system which  
 actually uses a sequential number generator.

28 <sup>3</sup> <https://youtu.be/AbzFEpTy0os>

8. Grant Rash Curtis' Motion for Partial Summary Judgment as to Mr. Perez's TCPA claim on the basis that, in the absence of actual knowledge that the cell phone number ending in 5193 had been reassigned to Mr. Perez, Rash Curtis was acting in "reasonable reliance" on the prior express consent provided by the cell phone number's previous owner, Mr. Reynoso.

In the alternative, if this Court is not persuaded by the *ACA International* decision, Rash Curtis hereby respectfully requests this Court reconsider Rash Curtis' Motion to Stay this action pending the outcome of *Marks v. Crunch San Diego, LLC*, Case No. 14-56834 (9<sup>th</sup> Cir. December 14, 2016). As previously explained in Defendant's Motion to Stay (Dkt. No. 156), the Ninth Circuit *sua sponte* stayed the *Marks* case, pending the outcome of *ACA International*. (See Rash Curtis' **Exhibit 24** in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 152-9.) Now that *ACA International* has been decided, Rash Curtis expects the Ninth Circuit will lift the stay in *Marks* and render a similar decision, which would not only clarify the Ninth Circuit's position on these issues but would also be binding precedent on this Court.

Respectfully submitted.

Dated: March 30, 2018

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